

FREQUENTLY ASKED QUESTIONS ON THE FDA REGULATION OF CIGARETTES AND SMOKELESS TOBACCO

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GENERAL

When will the Tobacco Control Act become effective?

The Act itself became effective on the date it was signed, June 22, 2009. The central rule implementing the Act (the “Rule”) became effective on June 22, 2010. Most of the answers to the questions that follow are based on the Rule, the Food and Drug Administration’s (“FDA’s”) supplemental rulemakings, and/or various FDA guidance documents.

What exactly is subject to regulation under the Rule?

The Rule governs virtually every aspect of the retail sale of “cigarettes, cigarette tobacco, roll-your-own tobacco, and smokeless tobacco.” “Smokeless tobacco” includes “snuff.”

Are cigars, little cigars, pipe tobacco or other products subject to the Rule?

No. Retailers should be aware, however, that there may be state laws governing the sale of these products. Also, the Tobacco Control Act does give the FDA authority to regulate cigars and other products in the future should it choose to do so.

What about electronic cigarettes?

The Rule does not address electronic cigarettes.

Are non-flavored papers for rolling one’s own cigarettes regulated the same way as cigarettes?

No. Non-flavored rolling papers by themselves are not subject to regulation under the Tobacco Control Act.

Do the regulations apply to sales on Indian reservations?

Yes.

Who will regulate in Tribal locations?

In the first instance, FDA itself will be responsible for regulating everywhere. The Tobacco Control Act does give FDA the authority, however, to sign agreements with the states and Tribes concerning enforcement.

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ADVERTISING AND LABELING

What are the rules on descriptors, like “mild” and “light” cigarettes?

The Tobacco Control Act banned labels with so-called “descriptors,” like “mild,” “light,” or “ultra light” as of July 22, 2010. The FDA will allow the sale of cigarette packages manufactured prior to that date, however, so long as a package was placed into commerce before July 22. If a cigarette package satisfies these requirements, it may be sold by retailers indefinitely. This “sell-through” is the subject of detailed FDA guidance available on the NACS website, but the test above is very simple.

Will descriptors such as “light” and “mild” have to be changed on receipts as well?

The FDA has not addressed this issue specifically. Out of caution, however, retailers should change the description of “lights,” “milds,” etc., on receipts to be on the safe side. FDA may view the inclusion of those words as a “promotion” of those kinds of cigarettes.

May a retailer use a sign (indoors or outdoors) that contains an image of a pack of cigarettes with its former descriptor (e.g., “Brand XYZ Lights”)?

The answer to this question is unclear. On the one hand, there are no advertising regulations in place. On the other hand, the FDA clearly prohibits descriptors from being used in connection with the sale of cigarettes. Retailers are best advised to eliminate the use of any descriptors for any purpose.

On a related note, in response to questions in this area, FDA staff has indicated that retailers may NOT direct customers to the new form of their cigarette brand. For instance, if a customer wishes to purchase what was formerly known as “Brand XYZ Lights,” a clerk may not direct a customer to the newly packaged cigarettes. Doing so, according to CTP staff, would constitute unlawful promotion of the cigarettes. NACS is endeavoring to change this policy.

Are retailers required to use only black and white coloring on labels and advertising?

Not currently, although that was a requirement of the Tobacco Control Act. That prohibition was successfully challenged in Federal court in early 2010 on constitutional grounds. The FDA has announced that it will not enforce the black and white-only provisions of the Act pending the outcome of that litigation. NACS has submitted a brief in support of the challenge in the appeals court.

What requirements or prohibitions are there on signage?

The FDA has not issued any rules or regulations governing signage under the new Tobacco Control Act. In response to FDA’s request for comments on the kind of advertising regulations that the agency should issue, NACS warned that virtually any kind of advertising would run a very high risk of violating the Constitution. (NACS’ comments are available on the website.)

Retailers should be aware, however, that the federal Cigarette Labeling and Advertising remains in full force and effect. That Act, among other things, requires the Surgeon General’s health warnings that have been appearing on cigarette packaging and advertising for many years.

Are there any other requirements or prohibitions on advertising, such as in newspapers or magazines?

See above. Not currently under the Tobacco Control Act, but the Cigarette Labeling and Advertising Act continues to require health warnings.

Must a retailer have the word "CIGARETTES" on any signage in stores?

No. The FDA has not issued any new rules or regulations governing signage.

What about any proprietary signage that retailers may have in their locations?

The FDA has not issued any new guidance or specific regulations on this issue.

Must any signage contain health warnings?

Yes, under the Cigarette Labeling and Advertising Act.

Is there a prohibition on outdoor advertising within 1,000 feet of a school or playground?

The FDA did not include this prohibition in the Rule. While the rule published in 1996 did prohibit outdoor advertising within 1,000 feet of a school or playground, a similar rule in Massachusetts was overturned by the U.S. Supreme Court several years ago. In light of that decision, FDA has not published any rules on outdoor advertisements and instead is soliciting comments about what outdoor advertising restrictions could be consistent with the First Amendment.

Until the FDA receives comments and releases a proposal there is no way to know what restrictions on outdoor advertising there might be and whether those restrictions would apply to signage within a store that can be seen from outside.

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AGE VERIFICATION

Do clerks working the store register really have to “card” ANYONE who appears to be younger than 27?

Yes, according to the FDA. The age verification requirement has generated a great deal of confusion, primarily because the Rule is written with a great deal of ambiguity.

The Rule says that (1) cigarettes and smokeless tobacco may not be sold to those under 18; (2) each retailer must “verify that no person purchasing the product is younger than 18;” and, (3) “no verification is required for any person over the age of 26.” Of course, there is no magic way to determine whether someone is over 26 without checking an ID. As a result, retailers are well-advised always to err on the safe side and instruct clerks to verify age whenever there is any doubt.

Is it a violation of the Rule if a retailer fails to check ID on someone that turns out to be younger than 27 yet clearly older than 18?

It appears so. Although the Rule does not address this issue directly, it does say that verification is not required for people over 26. That at least implies that there is a requirement to verify age for anyone younger than 27, and that the failure to do so amounts to a violation, subject to enforcement penalties. Again, retailers are advised to err on the safe side.

Is the rule that retailers must check identification for purchasers who “appear” to be under 27 or “are” under 27? There is a difference.

Unfortunately, again, the FDA has not provided any meaningful guidance in this area. The best practice is to verify the age of anyone who appears to be less than 27 years of age.

Can I accept an out-of-state driver’s license as proof of identification?

Yes.

Can children buy cigarettes for their parents or other adults?

No. All purchasers must be eighteen years of age.

Can an adult (18 or over) purchase a pack of cigarettes and then hand it to someone who is clearly not 18?

Yes. The regulations only apply to the purchase. FDA staff, however, has informally told NACS that this is a clear violation of the *spirit* of the law.

If underage people can’t buy cigarettes, can I give away free cigarette samples?

No.

Do I have to have a clerk process every cigarette or smokeless tobacco transaction?

Yes.

Can I continue to use a vending machine if I make sure a clerk keeps an eye on who is using it?

No. The Rule makes very clear that (with the exception of adult-only facilities) neither cigarettes nor smokeless products may be sold from a vending machine.

Can I provide free samples of smokeless tobacco?

Yes, but ONLY in so-called “adult-only facilities.” Such facilities are defined at great length in the Rule. The facility must:

- require each person present to provide to a law enforcement officer (whether on or off duty) or to a security guard licensed by a governmental entity government-issued identification showing a photograph and a birthdate;
- not sell, serve, or distribute alcohol;
- be located adjacent to or immediately across from (in any direction) a space that is used primarily for youth-oriented marketing, promotional, or other activities;
- be a temporary structure constructed, designated, and operated as a distinct enclosed area for the purpose of distributing free samples of smokeless tobacco;
- be enclosed by a barrier that--
 - is constructed of, or covered with, an opaque material (except for entrances and exits)
 - extends from no more than 12 inches above the ground or floor (which area at the bottom of the barrier must be covered with material that restricts visibility but may allow airflow) to at least 8 feet above the ground or floor (or to the ceiling); and
 - prevents persons outside the qualified adult-only facility from seeing into the qualified adult-only facility, unless they make unreasonable efforts to do so; and
 - does not display on its exterior—
 - (i) any tobacco product advertising;
 - (ii) a brand name other than in conjunction with words for an area or enclosure to identify an adult-only facility; or
 - (iii) any combination of words that would imply to a reasonable observer that the manufacturer, distributor, or retailer has a sponsorship.

Obviously, these requirements are intended to be stringent.

Are vending machines and self-service displays permissible in adult-only facilities?

Yes – in fact, the Rule permits such sales in any facility where persons under the age of 18 are prohibited from entering. In other words, they can be used in such facilities even if those facilities do not fully qualify as “adult-only” under the Rule.

What items besides cigarettes and smokeless tobacco must be placed behind the sales area, out of consumers’ reach?

The Final Rule only deals with cigarettes and smokeless tobacco. Thus, for instance, other tobacco products (such as pipe tobacco and cigars) do not have to be placed behind the counter.

What about pipe tobacco jars . . . can a customer smell and touch?

Yes.

Is self-service okay in an adult only facility?

Yes. Self-service is permitted in any facility into which no one younger than 18 years of age is permitted to enter at any time.

Self-serve ban: Can customers touch cigarette accessory items such as rolling papers, filters, etc. for roll-your-own?

Yes (other than with respect to flavored cigarettes, which are banned along with flavored rolling papers).

Is a drive-thru sale permissible?

Yes, so long as the customer does not have access to the product before the point of sale and the age verification requirements are followed.

If the customer gets a carton of cigarettes from a clerk, can the customer then complete the purchase in a self-checkout lane? Or do they have to actually pay in a face-to-face transaction?

The customer must pay in a face-to-face transaction. Self-checkout sales of cigarettes and smokeless products are prohibited.

What about tubes, papers, rolling machines? Must they also be behind the counter?

No. The Rule does not require that tubes, papers, or rolling machines be placed out of customers' reach.

Hypothetically, a retailer has a large display on a store floor that includes cigarette cartons and single packs. Customers pick up their brand, and bring it to the counter where a clerk can verify age. Is the display OK?

No. All "self-service displays" are prohibited as of June 22. Customers may not have any independent access to cigarettes or smokeless tobacco; they must ask for and receive it from a store clerk. The products must be kept out of reach from customers until the time of sale.

Would the FDA consider a casino an "adult only" facility?

Maybe. It depends whether or not anyone under the age of 18 is ever present or permitted. If a casino, for instance, allows children to accompany their parents, the casino would not be considered an "adult only" facility.

Would just putting up a sign on a door saying “employees only” be enough to ensure that a store is “adult only”?

Probably not. A sign would be a good start, but you must ensure that customers do not have independent access to cigarettes or smokeless tobacco. Retailers at adult-only facilities must make sure that no one under the age of 18 is permitted into an establishment at any time.

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ENFORCEMENT

Will penalties be assessed for not carding a customer who appears to be under 27 but is older than 18?

FDA will assess penalties against a retailer for failure to verify the age of someone who appears to be less than 27, even if that person turns out to be older than 18. Again, retailers are urged to use their best judgment on age verification. Any time there is any doubt, retailers should verify age.

Will the FDA provide guidance regarding the age verification requirements for those individuals that appear to be less than 27 years old? What specific CHARACTERISTICS does the FDA advise retailers to focus on in making the under-27 determination?

The FDA has apparently issued all the guidance that it intends to provide. FDA staff has said that, with respect to age verification, retailers have two obligations: (1) not to sell cigarettes to anyone under the age of 18 and (2) to verify the age of anyone who appears to be under the age of 27. According to FDA, retailers must verify age – even if that age is (for any number of reasons) well known to the retailer or a clerk. If a retailer does not verify the age of someone who appears to an enforcement official to be under the age of 27, the retailer will have committed a violation of the Act. Thus, we advise all retailers to verify the age of someone who is not clearly older than 27 years of age, even if that person is well known.

Will the FDA allow for mitigating circumstances in making a decision about an enforcement action in the over 18/less than 27 category?

Apparently not. FDA staff has indicated that no additional guidance will be forthcoming.

If there is a violation, who is fined? The owner of the store or the employee who committed the violation?

Under the Tobacco Control Act, the “retailer” is held liable. We interpret that to mean the owners and operators of the stores where the sales take place. State laws and company policies may vary, of course, but in the eyes of FDA, owner/operators will be the responsible parties.

Why shouldn't clerks be held responsible for underage sales instead of owners?

That is the policy choice that Congress made.

Who will the FDA use to check compliance in the stores?

The Tobacco Control Act envisions FDA entering into agreements with the states to continue doing the job that the latter have been doing for many years. FDA itself, however, does have the authority to police stores itself.

If retailers sell to minors, will they be subject to fines under both federal AND state law?

Yes. However, NACS did successfully get language inserted into the Tobacco Control Act that will hopefully prevent these “double jeopardy” cases, depending on the level of cooperation between FDA and the states.

Will employees of the FDA be conducting so-called “sting” operations at retail locations? If not, who will?

Yes. FDA and the states will both conduct sting operations and enforce the provisions of the Act, including the use of “mystery shoppers” that are under the age of 18.

In calculating the number of violations for underage sales and the escalating penalties associated with repeat violations, will violations be counted on an individual store basis or chain-wide? That is, if a chain has one violation within a year at each of 20 different stores, will the penalty for the violation at the 20th store be treated the same as the violation at the 1st store?

Neither The Tobacco Control Act nor its legislative history provides a clear answer to this question. NACS argued during the legislative process that penalties should be assessed on a store-by-store basis.

If FDA issues a no tobacco sale order, does it apply to all the stores that a company owns, a group of franchisees, or an individual store?

Again, the Tobacco Control Act does not provide a specific answer. NACS’ position is that the penalties for violations at one store should not be, in effect, shared with other stores. Therefore, a no sale order issued because of the violations of one store should not apply to stores with which it may have some kind of corporate or business relationship.

The amount of the civil penalty imposed for repeated violations depends on whether the retailer has an “approved” training program. What will these programs look like?

The FDA is currently conducting a proceeding to determine how to approve of training programs and what those programs should require. NACS submitted formal comments to FDA in this proceeding (available on the website), arguing strongly that the We Card program should simply be designated as an approved program. (See also “Retailer Training.”)

What impact will the Tobacco Control Act have on enforcement? Should retailers expect more visits at their locations checking for underage sales?

The FDA is required to work with the states on inspections, but also has authority to conduct them on its own. It should not come as a surprise to retailers if the number of inspections increases over time.

Does the number of violations accumulate over time?

Not entirely. For underage sales, violations accumulate over specific periods (from one to four years, on a rolling basis) for the purpose of determining the appropriate penalty. In general, a violation is technically expunged after four years.

Can you provide a copy of the penalty schedule?

A copy of the penalty schedule for underage sale violations is on the NACS website.

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GIFTS AND PROMOTIONS

Can sampling be done in the store if the store is deemed 18+ or an adult only facility?

No. "Sampling" of cigarettes is impermissible, regardless of location.

If a manufacturer contracts for in-stock guarantee of certain brands and it is store policy to issue a cash credit on the spot for the brands that are out of stock specified on the signs, is this considered a "gift or credit" by the FDA?

The FDA has not issued any specific guidance on this point. In general, however, coupons are permissible.

How do the rules work on affinity programs, customer loyalty programs, and so forth? Can retailers provide discounts based on the amount of purchases if those purchases include tobacco?

Unfortunately, the FDA has not issued clear guidance in this area, and NACS is aggressively seeking answers to the many questions that the prohibition on gifts associated with tobacco sale have given rise to. FDA guidance merely states that the Final Rule:

prohibits manufacturers, distributors and retailers from offering, or causing to be offered, any gift or item (other than cigarettes or smokeless tobacco) in consideration of purchasing cigarettes or smokeless tobacco or in consideration of furnishing evidence of a purchase of cigarettes or smokeless tobacco, such as proofs-of purchase, coupons, credits, or other evidence of such a purchase. The restriction also applies regardless of whether the consumer can redeem his or her proofs-of-purchase for all or part of the gift's or item's value.

This guidance would thus appear to prohibit any benefit (other than discounted cigarettes or smokeless tobacco) to a customer from the purchases of cigarettes or smokeless tobacco – whether it comes in the form of "points" of any kind, discounts on non-tobacco items (like gasoline), or the opportunity to obtain free merchandise. NACS will keep its members very closely apprised of regulatory developments in this area.

May a retailer give away a lighter with the purchase of cigarettes?

No. It is permissible to give away matches, but not lighters. FDA's rationale is that matches were mentioned in the Tobacco Control Act (even though in the context of advertising, and not gifts or promotions).

May a retailer give away a "branded" lighter with the purchase of cigarettes (e.g., a lighter with the name of a cigarette brand on it)?

No.

Would running a promotion for a free lighter with a 2-pack purchase be legal?

No. Lighters are an impermissible "gift."

What about casino reward points, such as playing a slot machine earning points and then spending the points at the retail store on cigarettes?

There is no specific FDA guidance on this issue.

Can a retailer conduct a "Buy 10 get 2 cans of smokeless tobacco for free" promotion?

Yes. What distinguishes this situation from other merchandise (like groceries) is the fact that it is a smokeless tobacco-related purchase.

What about smokeless displays, from free decks of cards to metal lids to metal tins?

Retailers must remove any self-service display of smokeless tobacco or cigarettes. The question then becomes whether a retailer may have a display of other items related to smokeless tobacco. In general, any non-tobacco product will be deemed a "gift" by FDA, and therefore not permissible.

What about cigars and loyalty? Do those points have to be separate as well?

No, because cigars are not subject to regulation under the Rule.

Would a "Buy one pack of cigarettes, receive a snuff free" be considered a free gift?

Although there is no specific guidance on this issue, the fact that the "gift" is another regulated product would presumably be authorized.

Are manufacturers' coupons like "buy 1 get 1 free" still okay?

Yes.

Can a customer REDEEM their loyalty points to buy cigarettes?

Yes.

May a retailer count the money spent on cigarettes or smokeless tobacco in any reward program in which a customer receives discounts on other services or products? For instance, if a retailer offers a program in which a customer receives a discount on gasoline for a certain amount of in-store purchases, may a carton of cigarettes be included in the calculation of that amount?

No. Customers may not receive "credits" or "points" for their purchases of cigarettes or smokeless tobacco that may be used for the discounted purchase of other merchandise.

Are credit card companies permitted to count purchases of cigarettes or smokeless tobacco in their reward programs?

Yes, because credit card companies are not regulated by the Tobacco Control Act.

What if the reward program offers discounts for shopping in the same store where the cigarettes were purchased?

No store credits for cigarette or smokeless purchases are permissible.

What if the reward program offers cash-back for purchases, which can then be used for the purchase of cigarettes?

A cash-back program is permissible for purchases of cigarettes and smokeless tobacco, but not for other items.

May a retailer count cigarette or smokeless tobacco purchases toward a "reward" that may not have any monetary value, such as being named "customer of the month"? Or a special parking space for a month in a parking lot that has ample free and available parking?

FDA staff has been unable to answer this question. Such a promotion would appear to violate the spirit of FDA's very strict interpretation of the Rule in other contexts.

May a customer's purchase of cigarettes at a retailer that participates in a group loyalty program with other retailers count toward an eligible discount (e.g., the purchase of items not sold by the original retailer)?

No.

May a retailer offer a discount or coupon for a future purchase of cigarettes if it does not have a particular brand in stock? May the coupon provide for a free pack of cigarettes?

Retailers are not permitted to provide free samples of cigarettes, but they may provide coupons for future purchases. Retailers should be careful to avoid programs that offer entirely free cigarettes in any circumstance.

May a retailer offer deep discounts (or even free merchandise) on non-tobacco products with the purchase of cigarettes or smokeless tobacco (e.g., buy a carton of cigarettes and receive 50% off the purchase of any other, non-FDA-regulated item)?

No. Any discount or free items given on the condition of a cigarette or smokeless purchase is not permissible.

May a retailer offer volume discounts of any kind on the purchase of cigarettes or smokeless tobacco (e.g., buy one, get one free)?

Under the Tobacco Control Act, retailers may offer volume discounts, but may not provide free samples. However, retailers should be mindful that numerous states have minimum price restrictions on cigarette sales that might preclude certain types of volume discounts.

Can I provide any kind of coupon that gives a customer something for free when he buys a carton of cigarettes?

No. For instance, a retailer may not accept a coupon that appears to entitle a customer to a free hat or some other product connected to the purchase of cigarettes or smokeless tobacco.

Does the FDA Rule prohibit coupon offers where retailers must provide customers with a \$2 off coupon if the retailer is out of stock on one of the targeted items?

No. The coupon, however, must be used for a purchase of cigarettes or smokeless tobacco.

Can a retailer package a carton of cigarettes with a deck of cards or another item as a promotion?

No. The cards would be deemed a gift, which is prohibited.

Can a retailer do a "Cigar Night" promotion, packaging four cigars and a couple decks of cards?

The Rule does not prohibit that promotion because it does not regulate cigar sales. State laws may regulate cigars, however.

Can a retailer offer a deal where purchasers of a certain amount of smokeless tobacco (say, 10 tins) gets two free?

Yes.

Can a retailer SELL tobacco product branded products like t-shirts, hats, mugs, etc completely separate from any other purchases?

As of June 22, manufacturers (and distributors of imported products) are prohibited from selling non-tobacco items, like T-shirts and novelty items, bearing a cigarette or smokeless tobacco brand-name, logo, or selling message. While there is no express prohibition on retail sales of these items, retailers are well-advised to stop selling them.

Can I provide free samples of cigarettes in an adult-only facility?

No.

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MENTHOL AND FLAVORED CIGARETTES

Is the sale of any flavored cigarette permissible?

No.

How does the FDA define a flavored cigarette?

Very broadly, though *it does not include menthol*: “a cigarette ... (including the tobacco, filter, or paper) [that] contain[s an] ... additive, an artificial or natural flavor (other than tobacco or menthol) or an herb or spice, including strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee, that is a characterizing flavor of the tobacco product or tobacco smoke.”

Because this definition is so broad, retailers should avoid the sale of all flavored cigarettes.

Does the FDA regulate the actual flavorings for cigarettes in any way?

Maybe. FDA staff has indicated that if a flavoring were intended for use in a cigarette it would be prohibited under the Tobacco Control Act.

Are flavored rolling papers included in the ban on flavored cigarettes?

Yes.

What about clove cigarettes?

Clove cigarettes are considered “flavored,” and their sales are completely prohibited under the Act.

When does the prohibition on the sale of flavored cigarettes go into effect?

The prohibition went into effect in September 2009. FDA has already enforced the prohibition against some retailers.

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RETAILER TRAINING

Have there been any guidelines setting forth what retailer training programs must contain in order to be approved?

The FDA has issued guidance describing what attributes training programs should have in order to be approved. This guidance is available on the NACS website.

Was We Card approved by the FDA?

We Card has not been approved as a training program – yet. NACS supports its certification/approval, and has filed comments (available on the website) to that effect with the FDA. NACS has also submitted comments relating to the agency’s requirements for retailer training programs (also on the website). NACS will continue to advocate for the We Card program to be approved by FDA to satisfy the retailer program requirements.

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